Federal Court  Cour fédérale

Date: 20170331

Docket: T-655-16

Citation: 2017 FC 336

Ottawa, Ontario, March 31, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

FRANCOIS BOSSÉ

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7, of an April 18, 2016 decision [2016 Decision] rendered by the Executive Director of the Canadian Human Rights Commission [Commission]. The 2016 Decision denied the Applicant's request for the Commission to reconsider his complaint. That complaint was denied when the Commission on July 9, 2014 refused to refer it to the Canadian Human Rights

Tribunal [Tribunal], on the basis that the Applicant had failed to exhaust all available remedies pursuant to section 42(2) of the *Canadian Human Rights Act*, RSC, 1985, c H-6 [Act]. This judicial review of the Commission's reconsideration decision is dismissed for the reasons that follow.

[2] The Applicant, now a retired member of the Canadian Armed Forces, had served for nearly a decade when he was released in 2013 due to a service-related knee injury. The Applicant claims he was the subject of a bogus disciplinary process initiated by his commanding officer, who, after discovering the Applicant had played squash, believed he had lied about the knee injury to secure a medical release and benefits.

[3] On August 28, 2013, following his medical release, the Applicant filed a complaint with the Commission, claiming that, under section 3 of the Act, he suffered a discriminatory disciplinary process, because he claimed its sole purpose was to bar him from receiving benefits. He alleged adverse differential treatment in the course of employment based on disability and language.

[4] On March 27, 2014, the Commission issued its Section 40/41 Report recommending that the complaint be dismissed per section 42(2) of the Act because the Applicant failed to exhaust his administrative (grievance) procedures. The Commission adopted this recommendation on July 9, 2014 [2014 Decision].

[5] On January 25, 2016, given that the grievance process had been fully exhausted, the Applicant requested that his August 28, 2013 complaint (that led to the 2014 Decision) be "taken out of abeyance". On Feb. 3, 2016 (by phone) and then on Feb. 8, 2016 (by letter), the Commission informed the Applicant's counsel that the file had never been "put into abeyance", but had rather been dismissed and permanently closed under subsection 42(2) of the Act, as communicated to him in the refusal letter.

[6] The Applicant responded, saying that the Commission should reconsider the matter in light of the Federal Court's decision in *Bossé v Canada (Attorney General)*, 2015 FC 1143 (Roussel J) [*Bossé*]. *Bossé* dealt with a separate grievance filed by the Applicant on March 25, 2013. The Court in *Bossé* sent the March 2013 grievance back for redetermination because it failed to address an issue, namely, the possible laying of charges which then precluded access to financial benefits.

[7] *Bossé* formed the basis of the Applicant's request for reconsideration, on the basis of "fresh evidence"; the Applicant argued that the Federal Court made clear that the issue of possible charges made against the Applicant was a live issue, and is the first time that this grievance is acknowledged as including acts of discrimination.

[8] After a series of exchanges with the Commission, its Executive Director, in his 2016 Decision (the subject of this judicial review) informed the Applicant the Commission would not reopen or reconsider the 2014 Decision because (i) the Act is silent on the Commission's authority to reconsider closed files; and (ii) while case law has recognized the Commission's

discretionary power to reconsider a matter in certain cases, those situations are narrow and do not apply.

II. Analysis

[9] The Applicant argues that the 2016 Decision was flawed on (A) fresh new evidence and (B) natural justice grounds. The parties agree, as do I, that the Decision is reviewable on a standard of reasonableness (*Merham v Royal Bank*, 2009 FC 1127 at paras 32-34 [*Merham*]). I will briefly review the law before conducting the examination of the two issues raised.

The Law

[10] While the Act is silent on the Commission's jurisdiction to reconsider past decisions not to refer a matter to the Tribunal, the Commission, as "master of its own procedure", has the discretion to reconsider decisions: *Kleysen Transport Ltd v Hunter*, 2004 FC 1413 at paras 8 and 13. Weighing against the Commission's ability to reconsider a past decision, is the doctrine of *functus officio*, which favours the finality of decisions and holds that generally tribunals may not reconsider past decisions (*Chandler v Association of Architects (Alberta*), [1989] 2 SCR 848 at 861-863 [*Chandler*]). Justice Sopinka held in *Chandler* that the *functus officio* doctrine applies to administrative tribunals, where it is somewhat more flexible than in a judicial context.

[11] Justice Mainville, in *Merham* at paras 23-25, after considering Justice Sopinka's ruling in *Chandler* as well as other cases, specifically ruled on the Commission's discretion to reconsider

its decisions. He held that this discretion should only be used sparingly and in exceptional circumstances.

[12] More recently, Justice Scott summarized four exceptions that *Chandler* established to the *functus officio* doctrine, which are limited to grounds of (1) new evidence, (2) natural justice, (3) jurisdictional error or (4) neglecting an open issue: *Chopra v Canada (Attorney General),* 2013 FC 644 at paras 64-65 [*Chopra*]. The Applicant, in this case, has argued on the basis of (A) new evidence, and (B) natural justice.

Issue A: New evidence

[13] The Applicant argues that the Executive Director should have granted his request for reconsideration because Justice Roussel's 2015 *Bossé* decision is new evidence. The Respondent counters that case law does not constitute new evidence, but even if one was to consider it as new evidence, *Bossé* deals with facts that occurred prior to March 2013. The Respondent argued that new evidence only relates to facts that transpired after the 2014 Decision; and therefore Justice Roussel's decision does not contain any new evidence.

[14] First of all, I agree with the Respondent that decisions are not new evidence. Rather, they are an analysis of evidence presented to the decision-maker (*Pathmanathan v Canada (Minister of Citizenship and Immigration),* 2009 FC 885 at para 43 [*Pathmanathan*]). While *Pathmanathan* was rendered in the immigration context, its principles apply beyond: a Court or tribunal receives evidence, and ultimately makes findings of fact and law based on the applicable standard of proof.

[15] In Alan W Bryant, Sydney N Lederman & Michelle K Fuerst, *Sopinka, Lederman & Bryant – The Law of Evidence in Canada*, 4th ed (Markham, ON: LexisNexis Canada Inc, 2014) at 3, the authors write, "[t]he rules of evidence control the presentation of facts before the court […] What are the logically relevant facts in any particular case, whether civil or criminal, is decided by the substantive law governing the cause of action or offence set out in the pleadings or the charge, as the case may be. These matters can tangentially affect the evidentiary principles in any given case, but they do not make up a part of the law of evidence." At page 37, the authors further explain that admissible evidence may be divided into five categories, none of which include case law: sworn statements, unsworn statements, things (e.g. a video recording), experiments, and documents (e.g. a will).

[16] In short, decisions themselves are not evidence, but rather are a part of the common law of the land, until such time as they are varied or overruled. The Applicant's supposition would mean that a finding of fact by a Court in one case could be used as mean to require reconsideration based on new evidence grounds in a subsequent case. This would offend *functus officio*, undermining finality in proceedings.

[17] Ultimately, if the Applicant thought the Commission erred in its 2014 Decision, whether in fact, in law or in both, a judicial review was open to him. That never occurred. The Applicant now collaterally attacks that decision through a Court ruling that made findings regarding an arbitral decision filed before the Commission's decision. In other words, the underlying facts being challenged were available to the Applicant at first instance, and are not fresh in the sense

of “new evidence”. I find nothing unreasonable about the 2016 Decision on the basis of this first issue raised.

Issue B: Natural Justice

[18] The Applicant argues that his right to be heard per the *audi alteram partem* rule was breached by the Commission in refusing to reconsider the matter. He contends that the Executive Director was silent on whether the reconsideration ought to be considered, such that the Commission is elevating procedural concerns above human rights. He argues that no prejudice would result from the reconsideration. The Respondent counters that the Applicant had the opportunity to be heard before the Commission in 2014, both before and after the Section 40/41 Report, and then, as stated above, after the 2014 Decision by way of judicial review.

[19] I begin by noting that it is not my role to comment on the Commission’s 2014 Decision, other than to note that to challenge the Decision through the guise of the Executive Director’s 2016 Decision is an inappropriate collateral attack on a final decision that was open to being judicially reviewed some two years prior, but never was.

[20] Furthermore, while I empathise with the Applicant’s difficult situation, this judicial review challenges the Executive Director’s 2016 (reconsideration) Decision, and not the underlying 2014 Decision, whereby the Commission refused to send the complaint to the Tribunal. The record indicates that the Applicant’s right to be heard was respected in the 2016 Decision. As has been discussed above in the review of the law, the Commission’s discretionary authority to reconsider its past decisions is very limited. Here, I find that no natural justice

breach occurred in the 2016 Decision and that its conclusion falls within the range of acceptable outcomes, made in an intelligible, transparent and justifiably manner (*Dunsmuir v New-Brunswick*, 2008 SCC 9 at para 47).

III. Conclusion

[21] In light of the reasons provided above, this application for judicial review is dismissed.

IV. Costs

[22] Apart from comporting themselves admirably and representing their clients so ably, counsel for both parties were able to reconcile on costs in advance of the hearing, helping the Court with this residual item. The Applicant shall accordingly pay costs in the amount of $2500 to the Respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review is dismissed;

2. Costs in the amount of $2500 are ordered to the Respondent.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	FRANCOIS BOSSÉ v CANADA (ATTORNEY GENERAL)
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